

No.

3764

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. L. NIDAY and MOLLIE
GREEN NIDAY, GEORGE
A. BUELL and EFFIE ADA
BUELL and A. L. GREEN,
Appellants,

vs.

JULIA GREEN GRAEF,
Appellee and Cross Appellant.

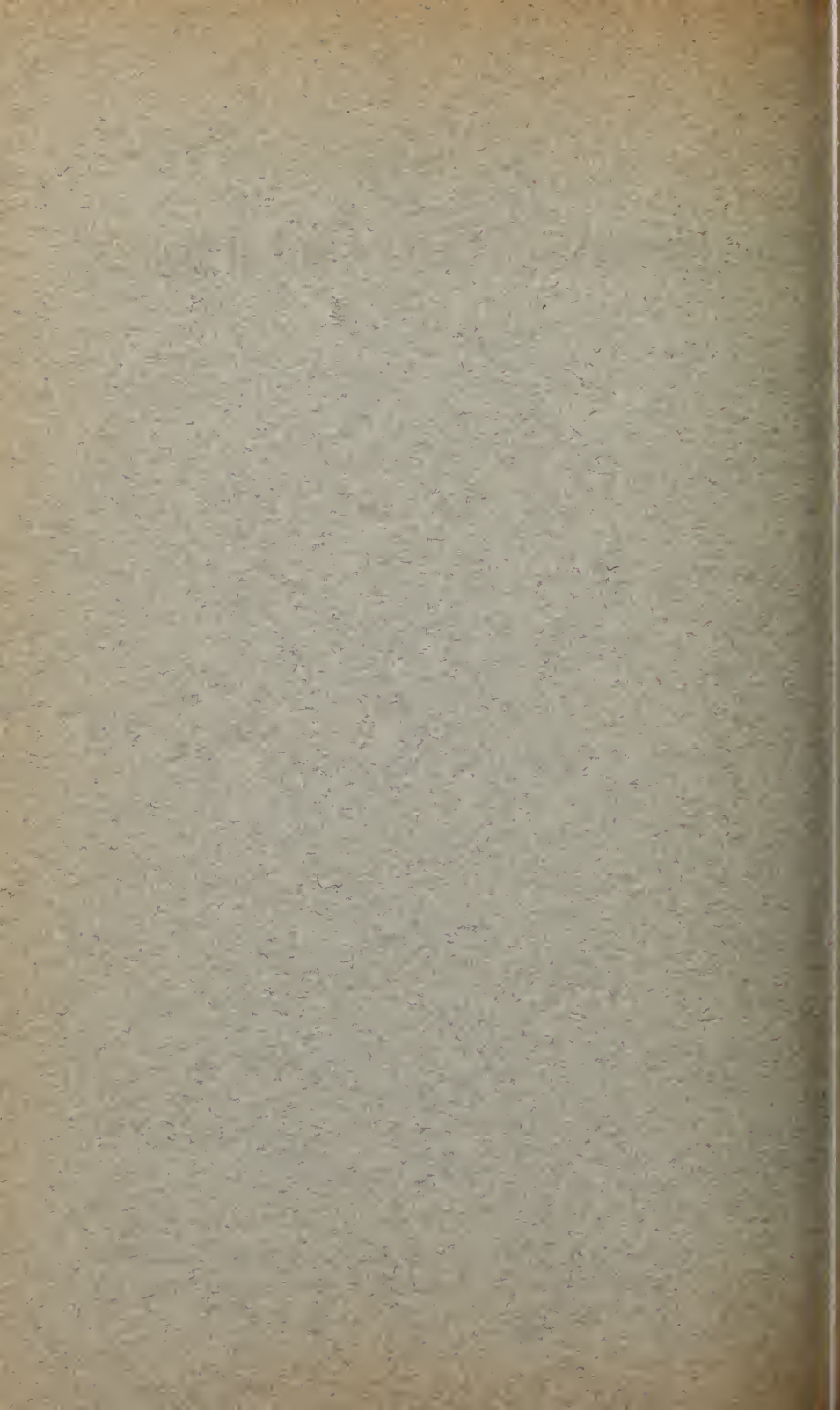
PETITION

PLATT & PLATT, MONTGOMERY & FALES,
Solicitors for Appellee

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PETITION

To the Honorable Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

The appellee and cross appellant respectfully
directs the attention of the Court to the subject
of an allowance to the cross appellant for attorney's
fees.

This Court in its opinion stated that no author-
ity had been cited for the allowance of other than
statutory costs or for allowing attorneys fees.

Since the rendition of the decision in this case, we have found a decision of the Supreme Court of the United States which, in our opinion, supports the cross appellant's claim for attorneys fees.

The allowance of costs and attorneys fees in a federal equity court is a matter within the sound discretion of the court and is not governed by statute.

“Costs in admiralty, as well as in equity, are in the discretion of the court.”

The Scotland, 118 U. S. 519.

Dodge vs. Tulleys, 144 U. S. 451.

Vol. IV, page 806, note 16, Enc. of U. S. Supreme Court Reports.

This principle was specifically applied by the Supreme Court of the United States in the case of Harrison vs. Perea, 168 U. S. 311, 325.

This was a suit instituted by one of the heirs at law of Jose L. Perea against a gentleman by the name of Harrison, individually and as administrator of the estate of his wife, and against the other heirs of the said Jose L. Perea.

The suit was brought to compel an accounting by the said Harrison, individually and as administrator, for the property of Jose L. Perea which had come into his hands.

The bill of complaint alleged misconduct on the part of the said Harrison in procuring and maintaining possession of such estate.

One of the objections raised in the Supreme Court of the United States related to the allowance of a solicitor's fee.

Upon this question the Court decided as follows:

"The defendant also objects to the allowance of the solicitor's fee which is charged against the fund. We think no error arises from this action of the Court below. By the exertions of the solicitor the fund was recovered and it was properly made to bear some portion of the expense of its administration. The amount was within the judicial discretion of the Court and in fixing that amount the Court could proceed upon its own knowledge of the value of the solicitor's services. *Internal Improvement Fund, Trustee, vs. Greenough*, 105 U. S. 527; *Fowler vs. Equitable Trust Company*, 141 U. S. 411, 415."

Harrison vs. Perea, 168 U. S. 311, 325.

We respectfully urge that the above case is directly in point in that it was a suit like the one at bar, by an heir at law to procure a fund improperly taken.

This Court in its decision has determined that Mr. Niday improperly obtained some deeds from Mr. R. E. Green and thereby became a trustee de son tort.

By his own wrong he made himself a trustee and compelled the plaintiff to litigate in order to procure her interest.

Under such circumstances, we respectfully urge that the plaintiff should be allowed her special costs and a reasonable attorney's fee.

As already shown, such allowance is within the discretion of a court of equity and is not governed by statute.

The Court's suggestion that we had cited no authority in support of this position was very properly made, and for that reason we have presented the above authority in this petition.

In connection with this petition we direct the Court's attention to the language at the bottom of page 6 and top of page 7 of its opinion, and ask for an instruction in this particular to the lower court in the mandate which is sent down.

This Court suggests that Mr. Niday must account for any profit made out of the sale, which we understand to be a well established principle of law.

This Court also suggests that Niday had a right to buy the interest of the heirs who sold to him, and that it was not necessary to account to Mrs. Graef for such purchase, but that he should account for any profit made out of the sale to the purchasers.

We interpret this language to mean that Mr. Niday could purchase the interests of the cestuis que trustent which he did purchase and that the

plaintiff could not question the purchase, but that Mr. Niday must account for the profits arising from the sale of the property acquired by such purchase.

This is in direct accord with the language of the Supreme Court of the United States in the case of *Michoud vs. Girod*, which reads as follows:

“We scarcely need add, that a purchase by a trustee of his cestui que trust, sui juris, provided it is deliberately agreed or understood between them that the relation shall be considered as dissolved, and there is a clear contract, ascertained to be such, after a jealous and scrupulous examination of all the circumstances, * * * *, and no advantage taken by the trustee of information acquired by him as trustee, will be sustained in a court of equity. * * * * And therefore, if a trustee, though strictly honest, should buy for himself an estate from his cestui que trust, and then should sell it for more, according to the rules of a court of equity, from general policy, and not from any peculiar imputation of fraud, he would be held still to remain a trustee to all intents and purposes, and not be permitted to sell to or for himself.”

Michoud vs. Girod, 4 Howard, 504, 556.

Also, the Supreme Court of West Virginia in affirming the above rule and holding that a re-sale of property purchased by a trustee from his cestui que trust necessitated an accounting to the cestui que trust of any profit made, concluded as follows:

“* * * if there are several persons occupying the position of cestui que trust, one may have the sale invalidated, though the others are content.”

Newcomb vs. Brooks, 16 W. Va. 70, 71.

We understand that the language of this court appearing on the bottom of page 6 of its opinion was used by the court in accord with the rule laid down in the case of Michoud vs. Girod, above cited.

In the case at bar the following situation has developed:

Mr. Niday sold the res of which he was trustee for the cross-appellant.

He converted this res into a mortgage, given by the purchasers of the property.

In connection with the sale Mr. Niday purchased the interests of two heirs.

The acceptance of the sale by the cestui que trusts validated the purchase made by Mr. Niday, in order to confirm the title in the innocent purchasers.

Under the new order of accounting, the actual value of the mortgage which represents the res will be about Twenty-four Thousand Dollars (\$24,000.)

One-half of this mortgage is to be awarded to the cross-appellant as her interest in the res.

One-third of the other half goes to Mrs. Niday as an heir of Mr. Green.

The other two-thirds goes to Mr. Niday by virtue of his purchase from the two heirs.

In the interest which Mr. Niday thus acquires, however, there is a considerable element of profit.

The evidence will undoubtedly show that Mr. Niday purchased these two interests for about Three Thousand Dollars (\$3,000.00.)

The value of these two interests is Eight Thousand Dollars (\$8,000.00).

Under such circumstances Mr. Niday should account to the cestui que trusts for the profit which he holds, and those cestui que trusts are Mrs. Graef and Mrs. Niday.

We therefore respectfully request that an instruction be inserted in the mandate giving specific directions as to the distribution of these profits.

Very Respectfully Submitted,

PLATT & PLATT, MONTGOMERY & FALES,
Solicitors for Appellee and Cross Appellant.

HUGH MONTGOMERY,
of Counsel.

